Supreme Court, U. S.
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In The

SUPREME COURT

of the

UNITED STATES

OCTOBER TERM, 1978

NO. 78-1572

JOHN C. HERRING, a/k/a SCOOTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

JOHN C. HERRING, a/k/a SCOOTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner, John C. Herring, a/k/a Scooter, prays that a writ of certiorari issue to the United State Court of Appeal for the Fifth Circuit to review its decision entered on the 12th day of February, 1979, dismissing petitioner's motion to recuse the trial judge pursuant to 28 U.S.C. 455(a).

JURISDICTION

The unpublished decision of the Court of Appeals was entered on February 12, 1979. The petition has been timely filed. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a new presiding judge should be assigned so that justice can satisfy the appearance of justice.

2. Whether the conflict among the circuits with respect to assigning a new judge upon retrial should be resolved for the sake of uniformity, due process, and equal protection.

STATEMENT OF THE CASE

Nature of the Case and its Disposition

Petitioner, John C. Herring, was intially charged in a five (5) count indictment alleging violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. Sections 801 et seq. The Honorable Wilbur D. Owens, Jr. was the presiding judge. The trial convened on June 21, 1976 with jury selection and actual presentation of evidence began on June 23, 1976. On June 26, 1976, Herring was found guilty on all five (5) counts and subsequently sentenced to seventy-five (75) years imprisonment and life-special parole--fifteen (15) years imprisonment and three(3) years to life special parole per count, to be served consecutively pursuant to 18 U.S.C. Section 4205 (c) which permits a reduction of sentence following a period of custodial observation and study by the Bureau of Prisons. The Court of Appeals, Fifth Circuit reversed and remanded the case for further proceeding. U.S. vs. Herring, 568 F.2d 1099 (5th Cir. 1978). After the reversal of the conviction, the Government considered filing a petition for rehearing but chose not to do so and the mandate issued. The case was reassigned to Judge Ownes.

On May 17, 1978, Judge Owens, acting ex parte, granted the Government's Motion for Evidentiary hearing of the type ordered in United States v. McKinney, 429 F.2d 1019 (5th Cir. 1970). Notice of this pending Motion was not mailed to Defense Counsel until Judge Owens already entered the Order granting the same. A Motion to vacate this Post-Appeal Evidentiary hearing was filed by Defense counsel on June 14, 1978 and denied by Judge Owens that day. The hearing was scheduled for June 24, 1978, although one of the twelve (12) jurors had died in the interim. On June 14, 1978 the Motion to disqualify the Honorable Wilbur D. Owens, Jr. was filed and the same was denied June 16, 1978. An Appeal was subsequently taken to the Court of Appeals for the Fifth Circuit from the failure to recuse and the Court denied this Appeal on February 12, 1979 in an unpublished opinion.

STATEMENT OF FACTS

John C. Herring was the former road manager of the Allman Brothers Band, a nationally known "rock" group. After Herring was indicted for alleged violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. Sections 801 et seq., a bond hearing was set. The Court received extrajudicial materials in camera and did not act on the bail motion until post trial. The Government's Motion to modify condition of release on appeal were granted without hearing on the same day it was made (R Vol. 1 P.66).

The trial judge denied Herring's Motion to supplement the record on appeal and it required an Order from the Court of Appeals to accomplish this routine application.

Since the reversal of the conviction, the trial judge has issued one or more ex parte Orders in furtherance of post-appeal procedures which frustrates the mandate of the Appellate Court (Order for Evidentiary Hearing dated May 17, 1978). The trial judge subsequently held an Evidentiary Hearing with the eleven (11) remaining jurors which was later ruled a nullity by the Fifth Circuit. (Order of July 3, 1978).

Additional factors which supported Herring's request for a new judge on remand may be found in the trial transcript. During the trial, the judge stated that other violators "would have been caught if you came forward and told

about it; (Tr 464) evidence extrajudicial knowledge of the facts (Tr 465), the sentence used as a tool with which to pry away the Defendant's privilege against self-incrimination which so "troubled" the Court (Tr 461, 464, 465).

While the emergency motions were pending in the Court of Appeals, Judge Owens held an Evidentiary Hearing to poll the jurors. After the hearing, the trial judge requested counsel for both parties to submit Briefs on their respective positions for the Court's consideration by June 29, 1978. Defense counsel's Brief was filed at 4:25 P.M. on June 29, 1978; literally, within three minutes of filing Defense Counsel's Brief, the Court issued an eight-page (8) typewritten Order ruling on the points to which Defense Counsel's Brief was addressed.

REASONS FOR GRANTING THE WRIT

I.

FOR THE SAKE OF RESTORING THE APPEARANCE OF IMPARTIALITY, AND IN RECOGNITION OF THE DIFFICULTY IN PURGING INFORMATION ONCE RECEIVED AND IMPRESSIONS AND OPINIONS ONCE FORMED, THE SIMPLE SAFEGUARD OF ASSIGNING A DIFFERENT JUDGE UPON REMAND SHOULD BE ADOPTED.

The Petitioner, John C. Herring, (who will be called "Herring" for purposes of the Brief), believes that the Honorable Wilbur D. Owens, Jr. is biased and prejudiced against him and that the transcripts of the original trial and subsequent hearings disclose that these assertions have a basis in fact.

Herring initially filed a Motion with the District Court on June 15, 1978 pursuant to 28 U.S.C. Section 455 as amended for entry of an order disqualifying the Honorable Wilbur D. Owens, Jr. as presiding judge in the case at bar and assignment of a different judge. As a basis, Herring's Motion alleged that Judge Owens' "impartiality might reasonably be questioned." This Motion was denied by Judge Owens, without hearing, on June 16, 1978. (Appendix "A")

A new judge should be assigned to preside over this case "both for the [original] judge's sake and [for] the appearance of justice." Mawson v. United States, 463 F.2d 29, 31 (1st Cir. 1972).

> The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact. Public Utilities Comm'n v. Pollack, 343 U.S. 451, 467 (1952) (Frankfurter, J)

Judge Owens had already heard pre-trial disputed evidence in camera at the initial bond hearing. This was to be a bond hearing, but as a result of this prejudicial prosecutorial material being viewed in camera, a fair hearing could not result. Leary v. United States, 431 F.2d 85, 90-91 (5th Cir. 1970) No authority supports this ex-parte or in camera practice. United States v. Wind, 527 F.2d 672, 676 (6th Cir. 1975). The Court should never have received "for in camera inspection the entire FBI file on this matter" as it related to the defendant (1st Supp. R., Vol.1, pp 4 & 34). The same can be said of the testimony of all the grand jury witnesses (Id.). It is a small complaint, by comparison, to point out the impropriety of the prosecutor having urged reliance upon Fuch's testimony in pleading guilty Id. at 3)-a "collateral proceeding...not subject to answer" by defendant. See United States v. Huff, 512 F.2d 66, 70-71 (5th Cir. 1975). (The portent of the material witness hearing is unclear. In the June 9, 1976 transcript of the Allman material witness proceedings, at p. 4, the court alludes to some knowledge of "problems associated with this case".)

During the trial, among other things, we find occasional cryptic references to the Court's knowledge of other pending cases (Tr. 53, 137), the Court's concern that one of trial counsel's alleged "sweeping questions before long is going to bring that out" (Tr 137), and its activism to prevent such a result (Tr. 136-37). Again, at the time of sentencing we discern a flavor emanating from beyond the four corners of the record herein (See Tr. 445-67). For instance, we find the judge commenting on the "holes" in the probation officer's presentence investigation and report:

> Now I know there are a lot of holes in this report because my good common sense tells me that there are a lot of things you could tell us that you have not told. But again, you don't have to incriminate yourself. (Tr. 461).

Shortly we discover his view that, "of course, a lot more [drug law violators] would have been caught if you had been among those who came forward and told about it. A lot more". (Tr. 464). Again, the judge starts to state what "the Court knows" and then appears to catch himself and shift to what he "sense(s)", his "feeling(s)", and to what he "suspicion(s)":

> Now frankly, the Court is troubled by your case and all of its ramifications. Without going into specifics, your case involves other cases. You know that, your lawyer knows it and the Court knows it, and I'm not going to prejudice anybody's

> rights by speculating on what other cases may be - I don't know. I just sense that. The Court is not privy to what goes on in the grand jury and in the prosecutor's office. But we get a feeling deep down inside about cases after we listen to a whole string of them. One thing leads to another. It's interesting how time passes and you find out it's true. I don't know that it's true, but I suspicion (sic) that this is part of a larger puzzle. It may not be. It may not be. But be that as it may, the Court is really not satisfied with the information it possesses about you. (Tr 465)

Putting aside the court's knowledge concerning the "case and all its ramifications", we find this passage and everything which preceded it almost as scary as the 75-year provisional sentence which followed it. We are not calmed by the fact that the judge appears to view his sentence as a tool comparable to the prosecutor's tool of immunity (Tr. 465) with which to pry away the defendant's privilege against self-incrimination which so "troubled" the court (Tr. 461, 464, 465).

Actual prejudice is evidenced by the judge's failure to act on defendant's bail motion until after trial, granting without a hearing (R. Vol. 1, p.66) the government's motion to modify the conditions of release on appeal (id., pp.63-64) on the same day it was made (id., p.66) even though it was served via mail (id., p.65), sentencing.

It is evident that the judge is privy, at least, to the FBI file and the grand jury minutes and there is every sign that this knowledge infected the sentencing contrary to the law as established in such cases as United States v. Huff, supra, United States v. McDuffie, 542 F.2d 236, 241-42 (5th Cir. 1976) (vacating a sentence by Judge Owens) and United States v. Rosner, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974). We, of course, are aware of the judge's volunteered assessment of his own impartiality contained in his several orders denying defendant's motion to supplement the record on appeal: "Under the circumstances, there is nothing to trigger the application of United States v. Huff, 512 F.2d 66 (2d Supp. R., p.2) (3d Supp. R., p.2). It was sufficient response that defendant had pending in this court his motion to strike extra-record statements of the district court. There is no assurance that the judge can untangle himself from his prior involvement in this case so as to sit unencumbered in future proceedings herein.

The most recent event to support Herring's Motion occurred after reversal of the conviction based upon adverse trial publicity and its affect upon the jurors. The Government interpreted the remand to require an Evidentiary Hearing as set forth in United States v. McKinney, 429 F.2d 1019 (5th Cir.

1970). An ex parte motion was filed and the same was ordered by Judge Owen. Although Herring objected to the procedure, the hearing was held. Judge Owens requested briefs be filed by both the Government and Defendant supporting their respective positions.

During the hearing, the judge interviewed the eleven (11) remaining jurors (one having died prior to this hearing) and was again exposed to extrajudicial materials which would prejudice Herring.

After the hearing, the judge requested briefs be filed by the Government and defense supporting their respective positions. Defense counsel's brief was filed within the time set. Contemporaneously with the filing of this brief, Judge Owens issued an eight-page (8) typewritten Order restraining the guilty verdict. The Fifth Circuit later ruled those procedings a nullity.

Thus, it is a sound and simple precaution to assign a new judge as in United States v. Huff, supra, for reasons similar to those stated in United States v. Stein, 544 F.2d 96, 104 (2d Cir. 1976).

> Under the circumstances, including the recognized difficulty which an original sentencing judge may have in rejecting or modifying prior conclusions and the necessity of maintaining the appearance of justice, we direct that the resentencing be conducted by a different judge.

II.

THE CONFLICT AMONG THE CIRCUITS SHOULD BE RESOLVED, THE DECISION REACHED IN THE FIFTH CIRCUIT SHOULD BE OVERRULED AND THE RESULT REACHED BY THE OTHER CIRCUITS SHOULD BE ADOPTED.

CONFLICT IN CIRCUITS

Having once heard evidence which satisfied a jury of a defendant's guilt beyond a reasonable doubt a trial judge will have formed a fixed opinion, based upon testimony elicited at trial as to the merits of the case. To expect more than this from any individual requires the impossible. As set forth in Cannon 4, Cannons of Judicial Ethics, "a judge's official conduct should be free from ... the appearance of impropriety." The serious question is raised as to whether the trial judge sitting at the retrial of the case would in fact create the "appearance" of prejudice.

The Fifth Circuit's position with respect to the original trial judge sitting upon remand conflicts with other circuits' rule that the same judge should not preside at a retrial.

THE FIRST CIRCUIT

Having no formal circuit rule requiring a new judge upon remand, the First Circuit joins in the opinion that a new judge should be assigned upon retrial. In Haverhill Gazette Company vs. Union Leader Corporation, 333 F.2d 798 (1st Cir.

1964) the court in that decision on page 808 stated:

> "Where a trier of fact has been corrected for a number of serious errors there are bound to be strains on a second trial, conscious or unconscious, irrelevant to the issues, and hence disruptive. One may think one was not really wrong and hence resist, consciously or otherwise, the new rules or, conversely, lean over backwards."

Herring will not reiterate the factual allegations raised within the first point of the petition, however, these allegations lend credence to the fact that Judge Ownes would be in the position of knowing certain factual issues which would be impossible to expunge from his mind.

THE SECOND CIRCUIT

As with the First Circuit, the Second Circuit follows the theory that a new judge should be assigned on retrial in order to avoid the appearance of impropriety. The Second Circuit's leading case, United States vs. Bryan, 393 F.2d 90 (2nd Cir. 1968) sets forth this basic principal. In that per curiam opinon on page 91 the Court stated:

> "Because we believe that this outweighs any considerations of judicial economy and convenience, we hold that it is the wiser practice, wherever possible, that a lengthy criminal case be retried before a different judge unless all parties request that the same judge retry the case. (Citing United States vs. Mitchell, 354 F.2d 767, 769 (2nd Cir. 1966).

The Bryan case, supra, has been cited with approval in those other circuits which hold that a new judge should be

required to sit at the retrial of a case.

DISTRICT OF COLUMBIA CIRCUIT

Chief Judge Bazelon of the District of Columbia Circuit has followed the Bryan ruling, supra, and has expressed the opinion that the District of Columbia Circuit should follow this example. Concurring in the case of Altman vs. Central of Georgia Railway Company, 540 F.2d 1105 DC Cir. (1976), Chief Judge Bazelon stated that he believed that when this particular case was remanded for retrial, that the better practice would be to transfer it to a new judge. In his opinion, Judge Bazelon noted the Seventh Circuit's Local Rule 23 and also cited Bryan, supra with approval.

THE SEVENTH CIRCUIT

The Seventh Circuit adopted Rule 23 which became effective April 23rd, 1972 providing that a case tried in a District Court, remanded for a new trial, shall be reassigned for trial before a different judge unless otherwise directed. Rule 23 further provides however, that the parties may request the same judge upon retrial. (Emphasis supplied).

DUE PROCESS REQUIREMENT

Due process requires nothing less of our judicial system than the right to have a fair trial in front of a fair tribunal. As the Court stated in In Re Murchison, 349 U.S. 133, 99 L. Ed 942 1955), our judicial system has always attempted to avoid even the possibility of unfairness and as

such we can ask for nothing less. Mr. Justice Black, in delivering the opinion of the Court at page 136, stated that such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.

Under the circumstances a new trial judge should be required and a uniform rule set forth that in criminal trial upon remand a new judge should be appointed so that "justice must satisfy the appearance of justice." Offutt vs. United States, 348 U.S. 11, 99 L. Ed 11, 1954.

CONCLUSION

In any situation where judicial impartiality may reasonably be questioned, the better path is to have a different judge preside at the new trial, should one be necessary. As the Court stated in American Cyanimid Company v. F.T.C., 365 F.2d 757, 767 (D.C. Cir. 1966):

> It is fundamental that both unfairness and the appearance of unfairness should be avoided. Wherever there may be reasonable suspicion of unfairness, it is best to disqualify.

The empirical facts appear to dictate a findng of pre-judgment by the trial judge.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

DO NOT PUBLISH

No. 78-5504
Summary Calendar*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN C. HERRING, a/k/a Scooter,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

(FEBRUARY 12, 1979)

Before COLEMAN, FAY and RUBIN, Circuit Judges.

PER CURIAM:

This matter is before us for the third time. In United States v. Herring, 5 Cir. 1978, 568 F.2d 1099, we reversed Herring's conviction on four counts of violating the Comprehensive Drug Prevention Act, 21 U.S.C. § 801, et seq., and one count of conspiracy to possess with intent to distribute cocaine, 21 U.S.C. § 846, and remanded for further proceedings. In United States v. Herring, 5 Cir. 1978, Unrep. No. 78-2339, we held that this prior decision required a new trial. The order entered in that matter refers to an intervening order by the district judge (for an evidentiary hearing with respect to validity of the original conviction) as null.

Now we consider an appeal from a motion to disqualify the trial judge brought pursuant to 28 U.S.C. § 455(a). The denial of such motions may be asserted by appeal from final judgment, by interlocutory appeal, or by mandamus. Davis v. Board of School Com'rs of Mobile Co., 5 Cir. 1975, 517 F.2d 1044, 1051-2, cert. denied 425 U.S. 944 (1976).

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

However, no final judgment has been entered, so we do not have jurisdiction of the appeal under 28 U.S.C. § 1291; nor has there been the certification indispensable to the appeal of interlocutory orders under 28 U.S.C. § 1292 (b). See also F.R.A.P. 5. Finally, although there was an application for mandamus in the second proceeding, No. 78-2339, none has been filed subsequent to it. F.R.A.P. 21; Local Rule 12.

Even if we were to set aside the order in 78-2339, in which we denied a mandamus petition without considering the recusal issue, and reinstated the mandamus petition filed on June 28, 1978, we would deny mandamus. There is no evidence of any reason for the judge to disqualify himself because of information obtained extrajudicially or by extrajudicial conduct. Davis v. Board, supra, 517 F.2d 1044, 1052. See also United States v. Grinnell Corp., 1966, 384 U.S. 563, 583; 86 S.Ct. 1698, 1710; 16 L.Ed.2d 778, 793.

Neither the knowledge obtained by a judge in trying connected cases nor the judge's exposure to background information regarding the defendant require that the judge recuse himself. U.S. v. Partin, 5 Cir. 1977, 552 F.2d 621, 637 and n. 21, cert. denied, 434 U.S. 903 (1977). Nor should the erroneous view of our original orders of remand taken by the court in granting a post-appeal evidentiary hearing require recusal. Cf. Reserve Mining Co. v. Lord, 8 Cir. 1976, 529 F.2d 181, 188 (open defiance of appellate mandate).

Although other circuits have taken a different view, United States v. Bryan, 2d Cir. 1968, 393 F.2d 90, the Fifth Circuit jurisprudence is settled to the effect that it is not improper, per se, for the same judge to preside over a retrial after reversal. U.S. v. Partin, supra, 552 F.2d at 637. See also, U.S. v. Hernandez-Vela, 5 Cir. 1976, 533 F.2d 211, 213-4; U.S. v. Smith, 5 Cir. 1966, 360 F.2d 590, 592.

In Partin, the Court reviewed the creation and subsequent decline of the disqualification-on-retrial doctrine announced in U.S. v. Bryan, supra. Finding such a per se rule untenable, the Court refused to follow it. 552 F.2d at 639. The Court also noted the rejection, in U.S. v. Smith, supra, of the argument that consideration of the presentence report necessitated disqualification. There the Court said:

> The receipt by a trial judge of a presentence investigation report, in a manner not prohibited by Rule 32(c)(1), does not disqualify him from hearing evidence on a reopening of a trial. To suggest otherwise would suggest also that he thereby renders himself incompetent to hear a retrial of the same case, should he be reversed on appeal.... That would be highly untenable ...
>
> 360 F.2d at 592.

For these reasons, the appeal is dismissed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
FEB 28 1979
EDWARD W. WADSWORTH
CLERK

No. 78-5504

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN C. HERRING, a/k/a Scooter,

Defendant-Appellant.

- - - - -

Appeal from the United States District Court for the
Middle District of Georgia

O R D E R:

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

(✓) The motion of APPELLANT for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including MARCH 14, 1979, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

_____

APPENDIX C

Supreme Court of the United States

No. A-781

JOHN C. HERRING, a/k/a SCOOTER,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner~~(s)~~,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 13, 1979

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 9th day of March, 19 79.